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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 309

LEO KUBIK and J. C. WHITE, *Petitioners,*

against

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LOUIS M. KAPLAN
JOHN P. DIUGUID
1001 Connecticut Ave., N. W.
Washington, D. C. 20036

Counsel for Petitioners

Of Counsel:

CARR, BONNER, O'CONNELL, KAPLAN & SCOTT
1001 Connecticut, Avenue, N. W.
Washington, D. C. 20036

RAYMOND E. POGGE
206 Wickham Building
Council Bluffs, Iowa

JAMES A. PRATT
201 First National Bank Building
Council Bluffs, Iowa

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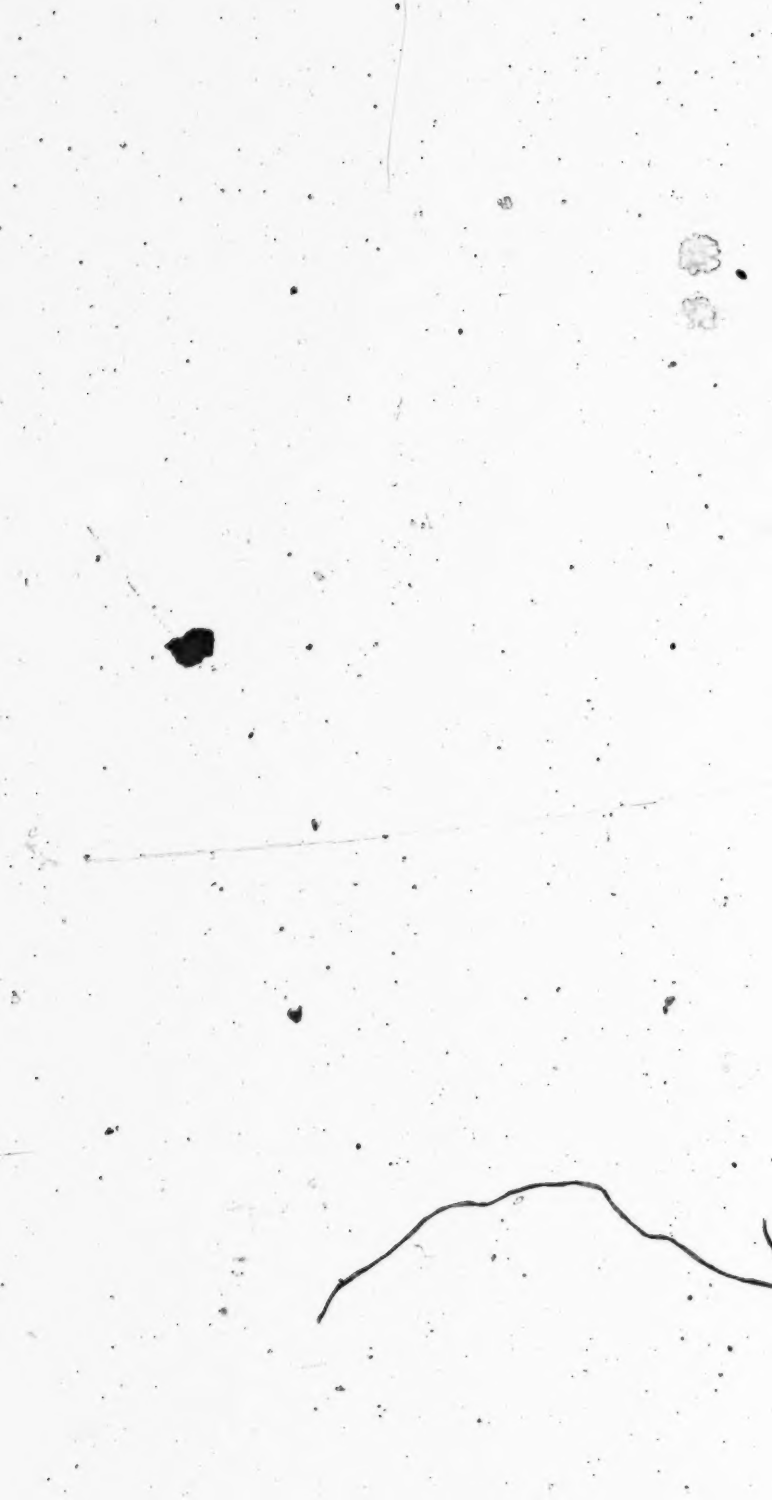

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners seek a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the captioned case on May 20, 1968.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Appendix A, pages 1a-11a), has not been reported as of this date. No petition for

rehearing was filed. The Court of Appeals affirmed the judgment of conviction rendered by the United States District Court for the Southern District of Iowa, Central Division. No opinion was rendered at the time of conviction. On a motion to suppress, the District Court rendered an opinion, (Appendix A, pages 11a-14a), which also has not been reported as of this date.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1968. By order dated June 14, 1968, Mr. Justice White extended until July 19, 1968, the date within which a petition for certiorari in this case might be filed with this Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioner Kubik was convicted on three counts of an indictment charging violations of various sections of the Internal Revenue Code dealing with the obligations of persons engaged in the retail sale of liquor and a fourth count charging a conspiracy with petitioner White and others to carry on the business of a retail liquor dealer without keeping adequate records and otherwise conforming to applicable regulations. Petitioner White was charged under and convicted on the conspiracy count alone.

The Government's evidence at trial included testimony from special investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service recounting certain incriminating statements made to them by petitioners and certain physical evidence

seized from petitioner Kubik's automobile and the premises at which the petitioners were found. Through motions timely filed with the District Court, petitioners sought to suppress such evidence on the grounds that at no time during the course of the investigators' interrogations or procedures were they advised of their constitutional rights to remain silent or to obtain the advice of counsel before making any statement; nor were they advised that any statements made or physical evidence taken might be used as evidence in a criminal prosecution against them. The District Court denied the motion; the Court of Appeals affirmed.

The questions presented are:

I. Are the requirements of *Miranda* v. *Arizona,* 384 U.S. 436 (1966) and *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) limited to police interrogations of suspects who have been arrested or physically taken into custody, or are they applicable to all governmental interrogations made in the course of official investigations that seek to elicit information that can be used in a criminal prosecution of the respondent?

II. May statements obtained in the course of a governmental interrogation, in which the respondent has not been advised of his constitutional rights to remain silent and to obtain the assistance of counsel nor of the fact that statements made and evidence obtained may be used in a criminal prosecution against him, provide the basis for searching private property and seizing evidence without a warrant, or would the use of evidence so seized violate the respondent's rights under the Fourth, Fifth and Sixth Amendments to the Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution (Amendments IV, V and VI) are set forth in Appendix B, at pages 15a-16a. The provisions of the Internal Revenue Code and Criminal Code cited in the indictment returned against petitioners are set forth in the same appendix at pages 16a-21a.

STATEMENT OF THE CASE

Petitioners were indicted, tried and convicted of offenses arising out of the operations of a so-called "Bottle Club" in Carter Lake, Iowa. Count I of the indictment charged petitioner Kubik with conducting a retail liquor business but failing to maintain records of the liquor received, in violation of 26 U.S.C. §§ 5124 and 5603. Count II alleged that petitioner Kubik, being a person who sold liquor, possessed a bottle containing liquor other than that contained in the bottle at the time federal stamp taxes were affixed thereto, in violation of 26 U.S.C. §§ 5301 and 5606. Count III charged petitioner Kubik with knowingly failing and refusing to produce to duly authorized officers of the Internal Revenue Service records showing the source and quantity of all liquor received, in violation of 26 U.S.C. §§ 5124 and 5603. And Count IV charged that both petitioners Kubik and White together and with others knowingly conspired to carry on the business of a retail liquor dispensary without conforming to applicable federal statutes and regulations, in particular, by failing to maintain adequate records of receipts and by purchasing liquor from dealers who had not paid the wholesale liquor dealer tax, in violation of 26 U.S.C. § 5117(a) and 18 U.S.C. § 371. Petitioner Kubik was sentenced to four concurrent one year terms of imprisonment and fined $1000. Petitioner White was

fined $250 and placed on probation for two years following confinement for 90 days.

The case against petitioners was built through the efforts of a number of special investigators and agents of the Internal Revenue Service. Over a period of a year, several agents obtained access to the Shangrila Club, which petitioner Kubik contended was a "bottle club".* On all but the last two of these occasions, they did not identify themselves as government agents. (T. 79; 119).** They testified that they were able to gain access to the Club without membership cards and to purchase alcoholic beverages by the drink and that drinks were served from unmarked decanters and sold to all of the Club's occupants for $1 per drink.

On one relatively early occasion during their surveillance of the Club, the Internal Revenue Agents sought to obtain a search warrant. The warrant was to be based on information that liquor was being dispensed at the Club although petitioner Kubik lacked a retail liquor dealer's tax stamp. However, petitioner obtained the stamp before the warrant issued and no further effort was made to obtain a warrant to search the premises. (T. 135) Instead, the agents embarked on a systematic campaign to ingratiate themselves with petitioner by occasional appearances at the Club. One agent visited the Club nine times; another was there three times, as was a third (T. 68, 73, 77 [Agent Gooder]; T. 211 [Agent Finney]; T. 248 [Agent Daley]. On almost every such occasion two to five

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* Had the jury accepted petitioners' defense that the Shangrila Club was, in fact, a bottle club, i.e., a club in which members are served liquor from their own bottles stored on the club's premises, the Government would have had no case. Its charges rested on the characterization of the Shangrila Club as a public facility selling petitioners' liquor by the drink.

** T. = Trial Transcript; M. = Motion to Suppress transcript.

drinks were purchased by each agent. Finally, after petitioner was apparently well-acquainted in particular with Special Agent Finney, the latter identified himself to petitioner as a Revenue Agent. (T. 131) With a concealed microphone on his person to transmit the substance of their conversation to a distant recorder, Agent Finney then sought to "advise" petitioner of his obligations under the Internal Revenue Code (M. 9, 10) and elicited a number of incriminating statements from petitioner in the course of a talk Finney said would be "confidential." (T. 194) During this interview, Agent Finney at no time advised petitioner of the latter's constitutional rights to remain silent or to obtain counsel or that any statements made could be used against him in a criminal prosecution. (M. 24-25; T. 133). Indeed, the statements elicited from petitioner in this environment were found by the District Court to be so prejudicial to petitioner that it refused to permit the Government to introduce into evidence the recording made of the conversation. (T. 145-46)*

Despite the statements Agent Finney obtained from petitioner in this way and the personal knowledge the Agent had obtained through prior visits to the Club, no attempt was made to arrest petitioner on this occasion. Rather, petitioner was, at that time, simply encouraged to speak frankly and even to display to Finney liquor

* Although the tape was suppressed, the statements of petitioner as heard by the agent were nevertheless received in evidence. The Government thought them so important that the U.S. Attorney, in summation, went so far as to comment—totally inappropriately and in violation of petitioner's rights under the rule of *Griffin* v. *California*, 380 U.S. 609 (1965)—on petitioner's failure to rebut the testimony of the agent. (T. 408-09). However, this point was not raised at the trial or Court of Appeals levels and is mentioned here only as evidence of the extent to which the Government was willing to go in prosecuting petitioner.

that petitioner stored in the trunk compartment of his car. Although long after-the-fact the District Court excluded from evidence the recording of petitioner's comments, the entire episode was one which would have led a person in petitioner's situation to believe that the Agent was not engaged in building a criminal case against petitioner but was, instead, merely attempting to give advice on proper compliance with liquor laws.

It is, thus, not surprising that when three months later Agent Finney again arrived at the Club, accepted a drink offered by petitioner and eventually engaged petitioner in conversation, without expressing any warnings or advising petitioner that incriminating statements and evidence might be used to convict him of a federal offense, petitioner freely discussed his business and its informal operations with the Agent and "volunteered" to reveal to the Agent additional bottles of liquor stored in the trunk compartment of petitioner's car. The relationship between the parties is perhaps best expressed by petitioner Kubik's reaction to the statement that Finney and another agent accompanying him planned a post-midnight inspection of petitioner's records to determine if they complied with the requirements of the Internal Revenue Code. Both agents testified that petitioner exclaimed "Are you kidding!" (T. 168, 201, 228). They were not kidding. They seized the liquor and arrested both petitioners.

Prior to trial, the admissibility of the statements made by petitioner Kubik and the evidence seized from the Club and from his car following the elicitation of those statements, was challenged by motion to suppress. The motion was predicated on the Fourth, Fifth and Sixth Amendments, as interpreted by this Court in

Escobedo v. *Illinois*, 378 U.S. 478 (1964) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The District Court denied the motion, stating

> "A suspect's Fifth Amendment privilege against self-incrimination, and his Sixth Amendment right to the assistance of counsel to protect that privilege come into play as soon as law enforcement officers take him into custody or otherwise restrict his freedom of action in any significant way. The requirements of a warning of constitutional rights are confined to situations involving custodial interrogation." (Appendix A, p. 13a)

With the introduction of this evidence permitted, petitioners were convicted. On appeal, the Court of Appeals said

> "We fully agree with the district court's findings of fact and conclusions of law and hold that [it] properly denied the motion to suppress.
>
> "The *Miranda* warnings have not been extended to pre-custody Internal Revenue inquiry.
>
> * * *
>
> "In our view the events that transpired were part of a pre-custody routine investigation by a diligent federal agent to determine whether the Shangrila Club had complied with the federal liquor laws. On this record we are convinced that Finney's questions were not tantamount to a custodial interrogation initiated after Kubik had been taken into custody or otherwise deprived of his freedom of action in any significant way." (Appendix A, pp. 5a, 8a-9a).

REASONS FOR GRANTING THE WRIT

First: Almost any citizen of the United States can be the subject of a federal tax investigation. The Internal Revenue Service is second only to the FBI in

seeking to invoke criminal sanctions for violations of federal law.* There is a definite need for this Court to define the extent to which its landmark opinions in *Escobedo* and *Miranda* are applicable to such investigations.

Second: Since this Court's opinion in *Miranda*, a number of Courts of Appeals have emasculated the holding of that case in situations in which "white collar crime"—in particular, tax offenses—have been investigated by government agents. These courts have generally applied the same theory as the one used by the court below to permit the introduction into evidence of statements elicited from persons lulled or tricked into making incriminating remarks while ignorant of their rights. A few District Courts have held to the contrary; at least one Court of Appeals has virtually requested guidance from this Court and has suggested that the prevailing and developing law is contrary to the constitutional principles established by *Miranda*. There is obvious confusion in the law that requires correction by this Court.

Third: The extent to which the *Miranda*-rationale is applicable to investigations other than suspect interrogation in a station house or jail is closely allied to the problems considered by this Court in *In re Groban*, 352 U.S. 330 (1957) and *Frank* v. *Maryland*, 359 U.S. 360 (1959). Both cases held constitutional protections unavailable in so-called "administrative" proceedings even though those proceedings could lead directly to criminal prosecutions. Both cases were decided by 5-4 majorities. But it is the views of the four dissenters

* Note, "The Constitutional Right to Counsel in Tax Investigations," 33 U. Chi. L. Rev. 134, 136 (1965).

which appear the more soundly based and more consistent with current constitutional development on these subjects. *Frank* was overruled in *Camara* v. *Municipal Court,* 387 U.S. 523 (1967) and *See* v. *City of Seattle,* 387 U.S. 541 (1967). This case provides a vehicle for a re-examination of *Groban.*

ARGUMENT

The Principles of Escobedo and Miranda Should Be Applied To Tax Investigations In Which Self-Incriminating Statements Are Likely To Be Elicited From Respondents

Escobedo was a murder case. *Miranda* was a prosecution for kidnapping and rape. However, at the end of the last Term, this Court made it plain that the principles established by the Court in those cases are no less applicable to "white collar" offenses such as tax violations. *Mathis* v. *United States,* U.S. , 88 S. Ct. 1503 (1968).

What were the principles of the cited cases? Essentially that when government agents consider criminal prosecution of the subject of their investigation, they must accord to the respondent of their inquiries the opportunity to avail himself of the basic procedural rights guaranteed by the Fifth and Sixth Amendments. Therefore, before questioning a person from whom incriminating statements are likely to be elicited, the government's agents must advise him of his privilege against self-incrimination, including his right to remain totally silent, and of the fact that any statement made may be used against him in a subsequent criminal prosecution. To render the technical rules of self-incrimination meaningful, the respondent must also be advised of his right to consult with counsel before determining whether he can or should assert his privilege against self-incrimination.

These do not appear to be terribly complicated principles nor even unusual ones. Nevertheless, the manner in which the Courts of Appeals have treated them in cases such as the instant one indicates a widespread lack of comprehension of their meaning in contexts other than station house interrogations of murder suspects.

In *Mathis,* this Court said expressly that "We reject the contention that tax investigations are immune from *Miranda* requirements for warnings to be given a person in custody." U.S. at ; 88 S. Ct. at 1505. There is no proper distinction between types of crime (at least of the felony type) for the constitutional principles on which *Miranda* rested.

And tax prosecutions are no minor matter. It has already been pointed out that the Internal Revenue Service is the second largest generator of federal prosecutions. A quick look at the Annual Reports of the Director of the Administrative Office of the United States Courts indicates that of approximately 30,000 federal criminal prosecutions annually during the last five years, nearly 10% concerned violations of the liquor trade requirements of the Internal Revenue Code.* Federal income tax fraud accounted for another 2% of all prosecutions initiated. In fact these two categories of offenses were statistically far more numerous than "common law crimes," were more numerous than narcotics offenses, and were exceeded only by auto theft and immigration law violations in numbers of prosecutions commenced. Clearly how investigations of such offenses are conducted is an important question in the administration of justice.

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* See Table D 2 in Director of the Administrative Office of the United States Courts, Annual Report 212-13 (1966); 246-47 (1967).

The lower courts have nevertheless evaded and avoided the *Escobedo-Miranda* rules in tax prosecutions by fastening on the fact that in the cited cases (and in *Mathis*) the respondent was "in custody." In the former cases he was at the station house; in the latter he was in jail—albeit not in a federal prison or in connection with the federal tax offense under investigation. The Court below expressly said as much. (See Appendix A, pp. 5a-9a). Other Courts have echoed this view. *United States* v. *Mancuso,* 378 F. 2d 612, 618-19, 387 F. 2d 376 (4th Cir. 1967). cert denied, U.S. , 88 S. Ct. 1051 (1968); *United States* v. *Maius,* 378 F. 2d 716, 718-719 (6th Cir.), cert. denied, 389 U.S. 905 (1967); *Frohmann* v. *United States,* 380 F. 2d 832, 835-36 (8th Cir.), cert. denied, 389 U.S. 976 (1967); *Kohatsu* v. *United States,* 351 F. 2d 898, 900-02 (9th Cir. 1965), cert. denied, 384 U.S. 1011 (1966); among the latest, reviewing the matter after *Mathis* was decided is *United States* v. *Jaskiewicz,* 278 F. Supp. 525, 532-33 (E.D. Pa. 1968).

But even while applying the rule, Senior Judge McAllister, for a unanimous 6th Circuit panel said:

> "A doubt may well assail us as to whether it is fair to a citizen to be summoned before the Internal Revenue agents to be informed that anything he says may be used against him,[*] and then for the agents of the Internal Revenue Service, personifying the authority and punitive nature inherent in law enforcement, to subject a man to questioning and to extract possibly by threats, insinuations, or subtle forms of suggestive coercion, the only evidence on which he can be sent to prison and to use

* In the instant case, the agents did not even advise petitioner of the fact that his statements might be used against him.

> this evidence to send him to prison. It would seem, in all fairness, that before he answers such questions and thereby directly incriminates himself, he should be advised of his right to have his lawyer present. . . . No one would believe . . . that a man would appear before government agents, and answer their questions, if he knew that the effect of his answers would be to send him straight to the penitentiary. But whether fair or not, . . . [until] we are told by superior authority that a citizen's constitutional rights are imperiled by such procedure, we are constrained to hold the evidence thereby obtained is admissible in the ensuing criminal trial." *United States* v. *Maius,* 378 F. 2d 716, 719 (6th Cir. 1967)

That Court began to see the real issue: Is the Government fairly respecting the citizen's constitutionally-protected rights by asking questions that could lead to criminal prosecution without first giving *"Miranda"* advice? To that issue, the fact of "custody" in a police station or a jail is and must be irrelevant. As one of the few courts that has recognized the problem has pointed out:

> "Whether a suspect is induced to incriminate himself by a combination of ignorance of his rights and coercive atmosphere of custody, or by ignorance of his rights combined with the inference that the purpose of the interrogation is simply to ascertain his dollars and cents liability for taxes, the result is the same, an involuntary self-incrimination. In some respects, the tax investigation is more insidious and dishonest than custodial interrogation, for the suspect knows his interrogators are seeking evidence to convict him of a crime while the tax suspect is permitted and even encouraged to believe that no criminal prosecution is in contemplation.
>
> * * *

"The inception of the adversary process was the core of the Court's concern in *Escobedo* and *Miranda*." *United States* v. *Turzynski*, 268 F. Supp. 847, 851, 853 (N.D. Ill. 1967).*

That is the point this Court needs to make. Custody is not the touchstone. There is no mention of custody in the applicable constitutional provisions. The key question is: When the Government seeks to fasten criminal responsibility on a citizen, how soon is it bound by the procedural limitations on its actions included in the Constitution? Logically—and practically—the Government must be bound the moment it begins to focus on a single individual as the perpetrator of known behavior presumed criminal (the situation in *Escobedo* and *Miranda*) or the moment it begins to focus on possible criminal behavior of a known individual under investigation (the situation in *Mathis* and in this case). It cannot matter for constitutional purposes which aspect is "known" or "presumed" first. Because the privilege against self-incrimination is the "essential mainstay" of the American system of criminal prosecution,** the Court must make clear to Government officials and the lower courts that the formal relationship of custody is beside the point. The average citizen does not have to be locked in the station house to feel the coercive pressure of official investigation.*** The

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* That the tide of opinions has been contrary to this view has not deterred another District Court from following it. *United States* v. *Wainright*, 68-1 USTC ¶ 9311 (D. Colo. 1968).

** *Malloy* v. *Hogan*, 378 U.S. 1, 7 (1964).

*** This truth has been expressed in another context most recently in *Terry v. Ohio*, U.S. , 88 S. Ct. 1868, 1877 (1968) in which the Court said, "Whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized'

Miranda warnings are due when an adversary relationship between the Government and the respondent begins, whether interrogation takes place in the courthouse, the jailhouse or the respondent's own house.

This case well demonstrates the need for a clarifying opinion from this Court. Much of the Government's case depended upon statements and evidence obtained from petitioner Kubik after Internal Revenue Agents had virtually become regular customers of petitioner's establishment. They artfully concealed their adversarial interests in his operations, to the point that they told him that their conversations were "confidential" and told the court they were "advisory." The facts are that the agents were trying to enforce the law and were trying to build a criminal case against petitioner. In that situation, they had square corners to cut, constitutional mandates to obey.

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that person." See also Comment, "The Right to Counsel During Police Interrogation," 53 Calif. L. Rev. 337, 359 (1965).

Compare Article 31, UCMJ, 10 U.S.C. § 831, providing, in part:

> "(b) No person subject to [the UCMJ] may interrogate, or request any statement from . . . a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is . . . suspected and that any statement made by him may be used as evidence against him."
>
> "(d) No statement obtained from any person in violation of this article . . . may be received in evidence.

This Court Has Not Yet Considered the Relationships Between the Principles Announced in Escobedo and Miranda and the Fourth Amendment

That the Court has long recognized the vital relationships between the Fourth, Fifth and Sixth Amendments to the Constitution requires no demonstration. Nevertheless, the principle has been lost on many of the lower courts, including those that considered these petitioners' cases.

From logical, practical and constitutional points of view, the Fifth Amendment's bar on involuntary self-incrimination is breached if the government may obtain incriminating statements under the guise of "mere" civil investigations into tax liability. It is no less a violation to permit the government to use such statements to obtain physical evidence or the probable cause to seize such evidence from the business establishment or automobile of the respondent. Misapprehension of the rights of the government to enter premises for the purposes of searching precludes the conclusion that the person searched voluntarily consented to it—as the Court just recently reiterated in *Bumper* v. *North Carolina,* U.S. , 88 S. Ct. 1788 (1968). By the same reasoning, "consent" to a search cannot be predicated upon statements given to government officers without the advice that the evidence uncovered may be used in a criminal prosecution against the person consenting and that the person to be searched has a right to consult with counsel to determine whether he should consent.*

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* See *United States* v. *Guerrina,* 112 F. Supp. 126, 129 (E.D. Pa. 1953), discussed in *United States* v. *Turzynski,* 268 F. Supp. 847, 851 (N.D. Ill. 1967). Cf. *United States* v. *Agy,* 374 F.2d 94, 95 (6th Cir.), cert. denied, 389 U.S. 881 (1967).

The first prong of this argument is, therefore, essentially an extension of the point made above, namely, that the privilege against self-incrimination and the right to the assistance of counsel at every stage of the adversary proceedings between the government and its subjects requires *Escobedo* and *Miranda* advice and warnings with respect to searches no less than with respect to oral statements. This the Court has not expressly held. It should.*

The second prong of the argument proceeds along the lines well chosen by the Court in *Camara* v. *Municipal Court,* 387 U.S. 523 (1967) and *See* v. *City of Seattle,* 387 U.S. 541 (1967), in overruling *Frank* v. *Maryland,* 359 U.S. 360 (1959).

In *Camara* the Court said

> "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.
>
> * * *
>
> "[We] hold that administrative searches . . . are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized or conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual" 387 U.S. at 530, 534.

The fact that the inspections in those cases were for "health," "housing" or "fire prevention" purposes rather than for "criminal law enforcement" was held

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* There is a suggestion of such a holding in *Harrison* v. *United States,* U.S. , 88 S. Ct. 2008 (1968). But the unique facts of that case may prevent it from becoming a key precedent.

to be without constitutional significance. The Fourth Amendment makes no such distinctions; it speaks only of the security of the citizen's property. If the Government is to enter or seize property it must establish probable cause in accordance with law. The required probable cause cannot be obtained through self-incriminating statements made in ignorance of constitutional rights. That the property was ostensibly entered or seized pursuant to an "administrative" or "civil" function of Government and not in its role of criminal law enforcer is a distinction without a difference for constitutional purposes.

In this case, most of the physical evidence introduced at the trial consisted of bottles of liquor seized from petitioner Kubik's automobile after he "consented" to showing it to the government's agents in the course of making his self-incriminatory statements. Added physical evidence was seized from petitioner's establishment following his arrest, although the arrest was also based primarily on the self-incriminatory statements made without advice concerning his rights or the assistance of counsel. Repeated efforts to suppress this evidence failed, again because of the mechanical application of legal clichés concerning the consent of the petitioner to the search and the non-custodial environment in which that consent was obtained. This type of decision making is either unthinking or consciously erosive of the principles this Court has sought to establish. Review of this case would enable the Court to reaffirm the principles announced in the *Camara* and *See* cases and to tie those principles to the *Miranda* view of constitutional requirements.

This Court Should Re-examine Its Decision in In Re Groban

As *Camara* and *See* enabled the Court to overrule *Frank,* review of the instant case would permit the Court to overrule its decision in *In re Groban* 352 U.S. 330 (1957). In that case, the Court, by 5-4 vote, affirmed the denial of a writ of habeas corpus to a person committed for refusing to testify in the absence of his counsel in an "administrative hearing" conducted by a fire marshal into the causes of a fire. Mr. Justice Black's dissenting opinion pointed out:

> "[It] violates the protections guaranteed every person by the Due Process Clause . . . for a state to compel a person to appear alone before any law-enforcement officer and give testimony against his will. . . . [The] majority . . . decides contrary to the general principle laid down by this Court . . . that an accused . . . 'requires the guiding hand of counsel at every step in the proceedings against him.'.
>
> * * *
>
> "The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination." 352 U.S. at 337, 338, 344.

These views, expressed in dissent, have been cited as authority by the Court in *Miranda* itself* and in the federal prosecution case of *United States* v. *Wade,* 388 U.S. 218, 231 note 15 (1967). However, the Court has never expressly overruled *Groban.* That decision is thus a further prop for the view that a person subjected to questioning in a non-custodial environment need not be afforded the assistance of counsel. This view is wrong. The instant case would enable the Court to say so.

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* *Miranda* v. *Arizona,* 384 U.S. 436, 466 note 36 (1966).

CONCLUSION

This is not just another tax prosecution. Although the Court has declined to grant a writ of certiorari in a number of such cases in recent Terms, the problem these cases present is an important and recurring one to the administration of justice. The Courts of Appeals, such as the one that decided this case, have ignored the lesson this Court has sought to teach by its landmark decisions in *Escobedo* and *Miranda*. Even less has there been an understanding of the vital interrelation between the Fourth, Fifth and Sixth Amendments in the context of criminal-oriented investigations conducted outside the police station. These matters require consideration by this Court. Petitioners, therefore, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals in this case so that justice may be done to them and the Constitution upheld.

Respectfully submitted,

LOUIS M. KAPLAN
JOHN P. DIUGUID
Counsel for Petitioners

Washington, D.C.

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